

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

United States of America :
 :
 v. : File No. 1:05-CR-12
 :
 Darrell K. Phillips :

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION
(Paper 99)

Defendant Darrell Phillips, proceeding *pro se*, has submitted a filing alleging ineffective assistance of counsel and violations of his Sixth Amendment rights. Phillips also seeks discovery with respect to investigations of his alleged criminal conduct. In June, 2006, after pleading guilty to bank robbery, the Court sentenced Phillips to 50 months in prison to be followed by three years of supervised release. The Court construes his current filing as a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2255.¹

On December 19, 2006, Phillips appealed his conviction to the Second Circuit Court of Appeals. In

¹ Phillips makes reference to "habeas corpus" in his filing, but also expresses a desire to "lodge a case against" his attorney. In construing the instant filing as a habeas corpus petition, the Court takes into consideration case law holding that a person who has been convicted of a crime "cannot sue his former attorney for damages through a civil rights action in federal court." McNeill v. People of City and State, 2006 WL 3050867, at *4 (E.D.N.Y. Oct. 24, 2006).

his notice of appeal, Phillips asserted a Sixth Amendment claim of ineffective assistance of counsel. The appeal is currently pending. Absent "extraordinary circumstances," a district court should not entertain a petition for habeas corpus during the pendency of a direct appeal. See Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 5, Advisory Committee Notes; United States v. Grullon, 1997 WL 739082, at *1 (S.D.N.Y. Nov. 25, 1997). Phillips has not alleged any such extraordinary circumstances. I therefore recommend that his petition (Paper 99) be DENIED without prejudice as premature.

Dated at Burlington, in the District of Vermont,
this 2nd day of April, 2007.

/s/ Jerome J. Niedermeier
Jerome J. Niedermeier
United States Magistrate Judge

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings,

recommendations or report to which objection is made and the basis for such objections. Failure to file

objections within the specified time waives the right to appeal the District Court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).